Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOE R. WILKINSON, ET AL.,

Petitioners,

vs.

DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Texas, by upholding the actions of the Court of Appeals, has rendered its own constitutional provisions relating to takings to be in violation of the provisions of the United States Constitution and 42 U.S.C. § 1983 by allowing the expansion of the notion of "community" damages in this case. By doing so, they have fostered the use of "community" damages as a subterfuge for immunity which has been made improper under previous rulings of this Court and also in violation of recent decisions of this Court with regards to the standards for partial takings. A "community damage" standard has been created which allows the system to make some pay for a benefit to be enjoyed by all and the community standard has been subverted to be one in which it is impossible for any large number of people to be legally harmed simply because they are a large number. Furthermore, this decision specifically upsets existing law with regards to avigation easements by wrapping them under the community exemptions – clearly in violation of existing law.

2. The actions of the Texas Court have been incompatible to recent actions of this Court as well as established law in that they have found that all takings, contrary to the plain language of their own constitutional provisions, must be total to rise to a constitutional wrong and also providing that the "community" blanket will prevent any sort of analysis for diminutions in value (even if serious) if they are characterized as a generalized taking rather than specific which rulings are in violation of this own Court's recent pronouncements.

QUESTIONS PRESENTED – Continued

3. The Texas courts improperly have upheld the summary relief against some of the Petitioners in this case since the airport based this upon an estoppel claim which denied the very nature of existing inverse condemnation rights under the provisions of federal law and obtaining a ruling that they were superseded by a subsequent conventional condemnation which thereby precluded already existing federal constitutional and statutory rights.

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All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings are the Petitioner herein and Appellants/Plaintiffs below as follows:

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and the Dallas/Fort Worth International Airport Board, the City of Dallas and the City of Fort Worth, the Respondents herein and the Appellees/Defendants below.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings iii

Table of Contents xix

Table of Authorities xxii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved ... 3

Statement of the Case 5

Reasons for Granting the Petition 10

I. Given the confused state of the law in this area, it is imperative that this Court delineate the serious questions raised by the actions of the Texas courts in creating a new zone of immunity in direct conflict with the rulings of this Court 10

II. The Texas courts misconstrued the applicability of the "community damages" defense in this matter since such is not applicable in cases of this type and, as interpreted by the Court creates an unconstitutional interpretation of the Texas Constitution thereby also creating a cause of action under 42 U.S.C. § 1983 by the creation of a limit to the pursuance of one's rights under federal law by faults in the protection of state law requiring the remedial action of § 1983 ... 11

III. Although the airport completely failed to respond to any of the Fourteenth Amendment claims such as unequal treatment during the expansion process and the inherent inequity of the "community" immunity (raised below) and thereby waived any opposition to such claims, yet the Texas Courts ignored this waiver and themselves argued a position not raised by the Respondent 18

TABLE OF CONTENTS – Continued

Page

IV. The State erroneously upheld the position that a later filed condemnation case, lacking various remedies and options under State law, can abrogate and eliminate certain Federal rights, already accrued, which required adjudication in a court of competent jurisdiction, especially when such limited state options frustrate the remedial purpose of 42 U.S.C. § 1983 19

CONCLUSION 21

APPENDIX

Appendix A, Court of Appeals, Fifth District of Texas at Dallas, Opinion, No. 05-99-01028-CV .....App. 1

Appendix B, Court of Appeals, Fifth District of Texas at Dallas, Judgment, No. 05-99-01028-CV .....App. 37

Appendix C, Court of Appeals, Fifth District of Texas at Dallas, Order on Petition for Review, No. 05-99-01028-CV .....App. 41

Appendix D, 160th Judicial District Court, Judge David C. Godbey, Dallas, Order Granting Summary Judgment (Wilkinson), Cause No. 94-9369-H .....App. 42

Appendix E, 160th Judicial District Court, Judge David C. Godbey, Dallas, Order Granting Summary Judgment (Baker), Cause No. 94-9369-H .....App. 45

TABLE OF CONTENTS – Continued

Page

Appendix F, 160th Judicial District Court, Judge David C. Godbey, Dallas, Order Granting Summary Judgment (Vece), Cause No. 94-9369-H .....App. 47

Appendix G, 160th Judicial District Court, Judge David C. Godbey, Dallas, Order Granting Summary Judgment (Barkis), Cause No. 94-9369-H .....App. 49

Appendix H, Supreme Court of Texas, Austin, Notice of Denial of Petition for Review, No. 01-0361.....App. 51

TABLE OF AUTHORITIES

Page

CASES:

Armstrong v. U.S., 364 U.S. 40 (1960) 18, 22

Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981) 16

City of Houston v. McFadden, 420 S.W.2d 811 (Tex.Civ.App.-Houston [14th Dist.] 1967 writ ref'd N.R.E.) 11

Dallas/Fort Worth Airport v. City of Irving, 854 S.W.2d 161 (Tex.App.-Dallas 1993, no writ) 6, 14

Felts v. Harris County, 915 S.W.2d 482 (Tex. 1996) ... 11, 12

Florida Rock Ind., Inc. v. United States, 791 F.2d 893 (Fed.Cir. 1986) (E.D.Pa. 1975) 17

Kite v. City of Westworth Village, 853 S.W.2d 200 (Tex.App.-Fort Worth 1993, no writ) 12

Monnell v. Dept. of Soc. Serv. of the City of New York, 436 U.S. 658 (1978) 16

Owens v. City of Independence, Missouri, 445 U.S. 622 (1980) 16

Palazzolo v. Rhode Island, ___ U.S. ___, 121 S.Ct. 2448 (U.S. June 28, 2001) 10, 13

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 22

Red Cross v. Rensselaer Co., 511 F.Supp. 364 (D.C.N.Y. 1981) 16

State v. Schmidt, 867 S.W.2d 769 (Tex. 1993) 13

TABLE OF AUTHORITIES – Continued

Page

State v. Windham, 837 S.W.2d 73 (Tex. 1992) 20

U.S. v. 275.86 acres of land, 687 F.Supp. 1079 (Tex. 1988) 20

Westgate, Ltd. v. State, 843 S.W.2d 448 (Tex. 1992) 14

CONSTITUTION

Texas Constitution, Article I, § 17 .....4, 12

United States Constitution, Amendment V..... 3

United States Constitution, Amendment XIV 1, 2, 3, 10, 18

STATUTES AND RULES

28 U.S.C. § 1257(a) 2, 4

28 U.S.C. § 2403(b) 5

42 U.S.C. § 1983..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a Writ of Certiorari be issued to review the Judgment of the Supreme Court of Texas in the case of *Joe R. Wilkinson, et al. vs. Dallas/Fort Worth International Airport Board* which had denied a Petition for Review and ordered published the original Opinion of the Dallas Court of Appeals, No. 05-99-01028-CV, giving it precedential value.

OPINIONS BELOW

Petitioners below, filed several cases in the District Courts of Dallas County, Texas, arising out of the expansion of the Dallas/Fort Worth International Airport and such cases were consolidated in the 160th Judicial District Court under No. 94-9369-H. After some discovery, orders were issued in such cases granting the Airport's motions for Summary Judgment on the 25th day of March, 1999, and the 6th day of April, 1999.

The Court granted a general Order granting Summary Judgment and the grounds raised by the Airport for its motion are recited in the Opinion of the Court of Appeals which is attached at Appendix A. In this initial stage, Petitioners had already raised issues relating to constitutionality of the Texas law with regards to the takings of property by inverse condemnation as well as alleging violations of 42 U.S.C. § 1983 and unequal treatment under the Fourteenth Amendment.

Petitioners appealed this action to the Dallas Court of Appeals in case 05-99-01028-CV and such was ultimately

affirmed by an opinion filed January 17, 2001. After the denial of a Motion for Rehearing, such appeal was brought to the Supreme Court of the State of Texas by a Petition for Review and such Petition for Review was ultimately denied by the Supreme Court of Texas on August 23, 2001, which then ordered the publishing of the opinion of the Dallas Court of Appeals, thereby enhancing its precedential value. No Request for Rehearing was filed and such final decision of this State Court has been brought to this Court on a Petition for Writ of Certiorari in this case.

Throughout this process, the federal issues relating to the constitutionality of the state statutes, the applicability of 42 U.S.C. § 1983 with regards to inverse condemnation, as well as questions of equal protection under the Fourteenth Amendment have all been raised and discussed.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). On August 23, 2001, the highest court in the state of Texas, the Supreme Court of Texas, denied Petitioner's Request for Review of the Judgment of the Dallas Court of Appeals. No rehearing was requested. Petitioners accordingly bring this Writ of Certiorari to the Supreme Court of the United States.

Notifications required by Rule 29.4 have been made to the Attorney General of the State of Texas that a

constitutional provision of Texas was being drawn into question on grounds of conflict with Federal standards.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured to an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article I, § 17, Texas Constitution:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of

its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 2403(b):

In any section, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for the presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

STATEMENT OF THE CASE

Petitioners are all, or have been, owners or inhabitants of homes in subdivisions in the area of northwest Irving immediately adjacent to the expansion of D/FW Airport. This policy of expansion by the Dallas/Fort Worth International Airport Board has involved an attempt to put through an expansion of a runway adjacent to, or near, the property of the Petitioners without

having proper authority to do so. This lack of authority was previously found by the Court of Appeals. *Dallas/ Fort Worth Airport v. City of Irving,* 854 S.W.2d 161 (Tex.App. – Dallas 1993, no writ). After the Court of Appeals held that the Airport was without authority, the Airport went to the Texas Legislature effectively confirming that the Airport's legal status had been inadequate. The Airport belatedly pursued a policy of a buyout/ condemnation, although the Petitioners had already suffered harm, of all the houses and property in the adjacent and interconnecting subdivision of Harrington Heights and a portion of the Broadmoor neighborhood, in which many of the Petitioners still live. By the spring of 1995, all the properties in Harrington Heights had been purchased and were soon destroyed. The adjacent homes in the Harrington Heights/Broadmoor neighborhood were demolished piecemeal as part of the Airport's policy when nothing would have prevented a purchase or condemnation with a subsequent removal. During this time, the properties of the Petitioners in Harrington Heights and Broadmoor Hills were damaged and they were subjected to mental and physical distress by the protracted physical invasion of their homes and persons by noise, dust, vibration (including explosive blast) and dislocation of vermin caused by the destruction of homes once part of their neighborhood, a damage peculiar to the neighborhood comprising Harrington and Broadmoor and not the community at large. This was made even worse by a policy to destroy the neighborhoods piecemeal in order to "encourage" people to take the Airport's offers and to move them out more quickly based on the expected misery of living in a demolition zone. Additionally, there

have been other physical invasions of the property, in both Broadmoor and Harrington, as a result of noxious fumes and contaminants when an area of the Airport, which had been used as a dump for various chemicals, was dug up as part of the Airport expansion process. These physical invasions and effects, prior to the overflights, have been as a direct result of the actions of the Airport and have not been suffered by the community at large since they were very specific and localized to the Broadmoor/Harrington neighborhood.

Besides the total buyout of the Harrington area, the Airport has, at times in the past, made promises that the Broadmoor area and the area of the Barkis Petitioners would be included in its mitigation program because of the effects on these properties from the expansion activities, described herein, and, for reasons known only to itself and as part of the bad faith discussed below, refused to extend any benefits to the homeowners. Finally, the Airport has finished the construction of the runway which was the object of the expansion and, since 1996, the Airport had began the flight of aircraft over the properties of the Broadmoor Hills, Barkis and Vece Petitioners and are over properties adjacent to that of the Petitioners with the result that they and their properties are now subjected to the recurring noise, pollution and hazard from these low and intrusive overflights detrimental to their health and the value of their property. Furthermore, in addition to the overflights since October of 1996, the property owned by the Barkis Petitioners has been subjected to difficulties because the Airport gave them specific assurances that their property would be bought out and that they were simply to wait. This action by the

Airport, after many years, was repudiated and they, therefore, have been left in limbo as a result of this had faith action by the Airport making the disposition of their homes and neighborhoods virtually impossible during that period. Furthermore, the withdrawal of the offer of assistance was predicated upon problems extraneous to those which had been previously stated, further showing bad faith.

These actions and damages to these properties have been even further complicated by the actions of high ranking Airport officials who said that the Airport would eventually be taking their homes and there was no point in doing other than the most essential repair work since anything else would not be compensated by the Airport and they would not be penalized. The result of this control, and the delays caused by the Airport's bad faith, supra, was that those properties deteriorated during the long wait for relief. This deterioration was caused by the direct action of the Airport to control the area and costs and resulted inevitably in a damage to the utility and marketability of the properties. The Airport "froze" these people and these properties by making it more difficult to sell or use these properties in any economically feasible way. As a result of these actions, the Airport controlled these properties to its advantage, subjected the properties and Petitioners to various direct physical harms and invasions and has failed to pay for its actions.

The action of the Airport in contravening many an understanding between the Airport and the Host Cities has amounted to acts of bad faith. There was a convention between the Airport and the Host Cities defining what would be the land use and intensities of activities in

the Airport past the year 2000 and would have required the Airport to go to these Host Cities for expansion, et cetera.

Later, the expansion continued the depression of values caused by the anticipation of the Airport expansion and, lastly, the overflight of aircraft for the surviving homes and homeowners has continued the damage. In further bad faith, the Airport, during the period when it was seeking approval of the modification of the Airport Act (in contravention of the original understanding), bought out a few homeowners as evidence of its good faith and generosity at prices which were much higher than those which were ultimately offered to other owners. These much publicized generosities were during a period in which the Airport was in need of support in Irving and from the Legislature, yet when the Legislature did pass the amendment, the Airport suddenly ceased to offer such lucrative terms. Condemnation did not begin until one year later and also at various points during these negotiations, promises and projections were made which would indicate that the Broadmoor and Barkis areas would receive compensation, since withdrawn. These bad faith tactics, based upon dubious authorizations, have caused the Petitioners to suffer great financial, physical and mental damages.

These issues, all relating to the constitutionality of the taking by the Airport both under the Constitution of the State of Texas, the U.S. Constitution and 42 U.S.C. § 1983 have been raised at all levels of this proceeding. As is shown in the attached materials below and the argument enclosed, the actions of the State of Texas have

acted to make their own constitutional provisions unacceptable in terms of U.S. constitutional analysis as well as requirements of 42 U.S.C. § 1983 and also in violation of the Fourteenth Amendment of the United States Constitution.

REASONS FOR GRANTING THE PETITION

I. Given the confused state of the law in this area, it is imperative that this Court delineate the serious questions raised by the actions of the Texas courts in creating a new zone of immunity in direct conflict with the rulings of this Court.

As this Court has held as recently as June, in *Palazzolo v. Rhode Island,* one of the most important issues to be resolved in any case arising under inverse condemnation and taking is to resolve the issues concerning those of *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978). *Palazzolo v. Rhode Island,* ___ U.S. ___, 121 S.Ct. 2448, at 2457-8 (U.S. June 28, 2001). In this situation, even in partial takings, the courts must resolve issues relating to the damage to reasonable investment based expectations *as well as* the character of the governmental action. Ibid. Discussed below, the actions of the Texas Supreme Court have created a situation in which this analysis is being abrogated and has created a zone of immunity which violates the provisions of this well established line of cases, directly in contravention of the actions of this Court.

II. The Texas courts misconstrued the applicability of the "community damages" defense in this matter since such is no applicable in cases of this type and, as interpreted by the court creates an unconstitutional interpretation of the Texas Constitution thereby also creating a cause of action under 42 U.S.C. § 1983 by the creation of a limit to the pursuit of one's rights under federal law by inadequacies in the protection of state law requiring the remedial action of § 1983.

The Texas court erroneously upheld the ruling of the trial court with regards to the issue of community damages. Previously, the Texas courts had held in the *McFadden* case and its progeny that this was a situation in which planes did fly over an area and that this fact was supported by the court itself in its opinion. *City of Houston v. McFadden*, 420 S.W.2d 811 (Tex.Civ.App. – Houston [14th Dist.] 1967 writ ref'd n.r.e.). It was controverted that this area was one in which overflights affected the population and thereby raising the issue of damages/avigation easement as established by this Court. Nonetheless, the Airport has claimed that this was a community damage because many people were involved in the range of harm. In the words of Mark Twain, "Not even a burglar could have said that better". The damage here is not suffered by the public as a whole but was just to those specifically involved in the flight and expansion areas. This damage was both in terms of the overflights as well as the specific effects of the expansion process. This was the situation contemplated by *McFadden* and its progeny in the other courts of Texas prior to the actions of the Texas Supreme Court in upholding the erroneous ruling of the Dallas Court of Appeals. *Felts v. Harris County*, 915 S.W.2d 482

(Tex. 1996). By the new standard, the Airport, or any governmental agency, need merely harm very large numbers of parties and it may therefore be absolved because damages can never be specific enough if suffered by enough citizens. This shows very clearly that the community defense, as argued and accepted by the Texas court, is one of immunity. The validity of a community defense, if there is any, is whether the effect from the governmental policy or action rises to the level of actual damage (versus de minimis) for the parties involved, as opposed to the world at large. In this case, the summary judgment evidence and pleadings said that they did and, therefore, this Court's own statements in the *Penn Central* case, and its progeny, require a reanalysis of this entire process and a rejection of the broad based community damage bar used by the Texas court.

Additionally, the Texas court made its own Constitution unconstitutional by reversing without comment a prior line of cases which held that this sort of activity was without any immunities. See *Kite v. City of Westworth Village*, 853 S.W.2d 200 (Tex.App. – Fort Worth 1993, no writ). *Also*, the clear language of Tex. Const. Art. I, § 17 shows that the interpretation of any such damage under the Texas State Constitution should be expansive rather than diminished. The court ignored the clear language of the Texas Constitution which gave protection against taking *and* damages. All the evidence and pleadings before the Court would be such as to show that this would be to create an unconstitutional expansion of the notion of community immunity and would fly in the face of various federal rules. The Texas Supreme Court previously said in the *Felts* and *Schmidt* cases that these damage

rules must not be strictly interpreted or narrowly applied. *State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993). Unfortunately they seem to have thrown these rules aside by allowing the Airport's notion of a blanket of immunity – under any name and circumstances – if only a large number of people are affected thereby without regards to the issue of whether or not their reasonable expectations have been damaged and by the nature of the governmental actions.

The Petitioners feel they must reiterate the very dangerous implications of the court's ruling in this case and the position of Airport. The characterization of any damages, on a large scale, as necessarily being community tends to simply create a license to damage. The court has, by agreeing to this interpretation, essentially negated the provisions of the Texas Constitution (making them repugnant to federal standards), the remedial aspects of 42 U.S.C. § 1983 and has also thereby overturned the rulings of the United States Supreme Court and other Federal cases (below).

Obviously, this is also directly contrary to the court's most recent ruling in a similar case with regards to *Palazzolo v. Rhode Island*, op.cit. In that case, the Court made it clear that a blanket rule recognizing only total takings is inappropriate. What must be done in each case of diminished value caused by governmental action is to review it under the standards of the *Penn Central* case and this will require an analysis both in terms of the diminution of reasonable investment backed expectations *and* the actions of the governmental entity.

The Texas court also reversed itself with regards to the interesting issue of governmental conduct – in this

matter, bad faith. *Westgate, Ltd. v. State*, 843 S.W.2d 448 (Tex. 1992). The Texas Supreme Court, in *Westgate*, previously made it clear that an additional ground for recovery under state law lay in the area of bad faith in situations of partial taking, along the lines of the rationale of this Court in *Penn Central*. The situation in the present case cried out for such an interpretation because of the conduct of the governmental agencies and the effect which it has had upon the reasonable investment backed expectations of the parties involved. Both as individuals and as groups, the treatment by the Airport of its neighbors was a chain of elements in bad faith leading to a course of conduct which essentially abrogated the reasonable investment backed expectations of these parties over a period of many years. E.g., a *Penn Central* situation. As was shown by uncontroverted evidence below and was argued below, the Airport clearly exercised a dominion and control over the properties of the Petitioners both in terms of legality and actual physical intrusion. The Airport, over protest and without legal authority, started a process which damaged the Petitioners both financially and emotionally when they had no right to do so. *Dallas/Fort Worth Airport v. City of Irving*, 854 S.W.2d 161 (Tex. App. – Dallas 1993, no writ). They developed a plan to drive out the parties in the areas which were being bought out be creating an unlivable situation in order to force people out more quickly and at a more "reasonable price". They punished the Petitioners for actions by the City of Irving by withdrawing their offers to mitigate their property, having the law of the State changed and further exercised and extended

the control over these properties as was shown below and was ignored by the court.

The Airport caused these damages within a specific zone of damages which it well knew and understood. These actions all resulted in the diminution and damaging of the reasonable investment backed expectations of these parties in the most important investments of their lives, their homes, and we have a pattern of behavior by the Airport damaging these expectations, indifference to the rights of the parties involved, including damage by explosive blast, actual trespass upon the property of the Petitioners, deposition of debris on the properties, et cetera. These were shown to be items far greater than the de minimis effects characterized by the Airport. These actions were taken in callous disregard of the rights of the parties under state and federal law and as punishment for attempting to stay in their homes and for opposition to the Airport's unauthorized attempt to expand. This pattern of bad faith governmental activity, whose goal was to financially benefit the Airport and to control and ultimately drive out the surrounding neighbors at minimum cost and then to force them to live under the effects of the Airport expansion can be nothing else but a situation for damages under *Penn Central* and existing laws. The actions of the Texas court in upholding the action of the Airport are therefore in violation of these previously cited laws.

The Texas courts have done serious violence to the protections afforded to these parties under 42 U.S.C. § 1983. This is one of the various post-civil war statutes undertaken to protect civil rights, one of which is the right to be secure in one's property. These were remedial

acts and were intended to be interpreted remedially. E.g. *Busche v. Burkee,* 649 F.2d 509 (7th Cir. 1981). It has been made very clear then, if state rules frustrate the operation of this protection by creating artificial barriers to recovery for these damages, then such state rules must disappear in favor of the federal protections. It was upon that basis that the immunity defenses historically raised by cities were abolished some twenty (20) years ago in *Owens v. City of Independence Missouri* and its progeny. *Owens v. City of Independence, Missouri,* 445 U.S. 622 (1980); see also *Monnell v. Dept. of Soc. Serv. of the City of New York,* 436 U.S. 658 (1978); *Red Cross v. Rensselaer Co.,* 511 F.Supp. 364 (D.C.N.Y. 1981). That remains the law. We would also note that the Texas State Constitution previously provided no such immunity in such cases and certainly this fascinating new breed of immunity which the Airport seeks to create called community damages should not be allowed to stand in the face of this rule. This draconian rule cannot exist in the fact of the countervailing policy. The question in such cases must be that we have to determine whether or not there are any significant damages that require compensation as a result of these governmental practices or policies. The de minimis damages, as always in the law, are not to be included. That must be the standard, otherwise we have simply frustrated the entire purpose of both the constitutional provisions and the statutory provisions of both state and federal law and that is, of course, the standard which was enunciated by this Court in the *Penn Central* case. The court also grotesquely characterized the situation saying that the damages had not been shown by other means relating to § 1983. On the contrary, it was clearly shown

damages to the values of the property caused by the action of the Airport in exercising its dominion over years as well as the damages caused by the enforced living under either overflights or during the period of the expansion and demolition – and physical invasion – of various parts of the city of Irving in which Petitioners lived. Petitioners also showed, as discussed above, numerous instances of actual physical invasion of the properties and only the barest physical invasion is necessary to support such claims.

Petitioners are frankly mystified as to why the *Penn Central* case was also dismissed. This is a matter in which the diminished values of the properties as grounds for recovery in the frustration or diminution of reasonable expectations, in conjunction with the governmental policy, is a clear-cut and obviously parallel situation to this and clearly inimicable to the community damages rationale. We would also have the court note earlier federal cases, e.g. *Florida Rock Ind., Inc. v. United States*, 791 F.2d 893 (Fed.Cir. 1986), et cetera, interpreting these matters which show clearly that damages need not necessarily be total under § 1983 especially when the government has exercised control over the properties – perversely they were not also required under the Texas Constitution until this action. This is a federal act, remedial in nature, and any rules, such as these Texas rules cited by the Airport which frustrate the route to recovery must be considered just as invalid as the previous protections of immunity. This Court's own recent pronouncements with regards to *Penn Central*, make it very clear that this standard is incorrect and must not be allowed to prevail. Texas has turned its own Constitution on its head, and has created a

new breed of immunity which will allow the diminution of the federal rights guaranteed under the Constitution and the various federal statutes and unfairly shift the cost of public projects from all to the few – and those few will be harmed rather than benefited by the change. *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).

III. Although the Airport completely failed to respond to any of the Fourteenth Amendment claims such as unequal treatment during the expansion process and the inherent inequity of the "community" immunity (raised below) and thereby waived any opposition to such claims, yet the Texas Courts ignored this waiver and themselves argued a position not raised by the Respondent.

Petitioners are even further mystified by the Texas court's position with regards to claims under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals, in several areas of its opinion, published by the Texas Supreme Court, determined, without support, that the Petitioners waived certain matters by the presentation or nonpresentation of such things. Nonetheless, the court very helpfully finds no such waiver on the part of the Airport at its *complete failure* to challenge or concern itself with the Fourteenth Amendment claims raised by the Petitioners. Why should that court treat these parties differentially? Why should the Airport's complete failure to address this issue constitute anything other than a waiver of the claims which were plead and raised at an earlier level and were never challenged in the least by the Airport? The court has, instead, put itself in the position of making an argument

for the Airport in attempting to "bootstrap" some sort of argument although controverted evidence was produced which showed unequal treatment and was discussed with regards to the bad faith issue and is, of course, germane to the entire governmental conduct/*Penn Central* issues as well as the entire underlying notions of the unequal treatment inherent in the notion of community damages where some pay the costs for all. This only serves to underscore the very dangerous nature of the protection of the community defense and the corrosive effect on previous rulings of this Court – as well as those of Texas.

IV. The State erroneously upheld the position that a later filed condemnation case, lacking various remedies and options under State law, can abrogate and eliminate certain Federal rights, already accrued, which required adjudication in a court of competent jurisdiction, especially when such limited state options frustrate the remedial purpose of 42 U.S.C. § 1983.

The Petitioners remain mystified by the actions of the Texas courts upholding the claims by the Airport that the rights of the Petitioners to pursue their inverse condemnation cases should have been limited and short-circuited by the limited condemnation process which the Airport began only *after* many of the damages and harms enumerated in this case had already occurred. This is an *inverse* condemnation case. The Airport cannot simply turn it back into an ordinary condemnation case by starting the process later. The harms and damages in an inverse condemnation case are quite different from those in a condemnation matter. The Dallas County courts which

handled the condemnation cases are not suited for the litigation of these various issues, if only because of some of the jurisdictional amounts and some of the damages which were available under condemnation as opposed to the more wide ranging damages associated with an inverse condemnation case, including federal damages which are not contemplated in the typical condemnation situation. The nature of this case should not allow the Airport to subsequently claim that it has short-circuited an inverse condemnation claim by beginning another. The Airport cannot try to hide behind a condemnation which it undertook too late, as a result of its own policies, discussed above, and which was not adequate to provide all the damages which had already occurred and which were going to occur as a result of its actions. These were inverse condemnation cases involving issues related to both federal and state issues and which were inappropriate for determination in a case in a court whose only concern was to determine fair market value, et cetera. *State v. Windham,* 837 S.W.2d 73 (Tex. 1992); *U.S. v. 275.86 acres of land,* 687 F.Supp. 1079 (Tex. 1988). Obviously, this serves to highlight the inadequacy of the state law and the necessity of the § 1983 protections which were necessary in this case and which made action in the County Court inappropriate and which made the court's ruling that there should have been some sort of estoppel arising out of the actions in the County Court all the more bizarre.

The pleadings did specifically state the State laws failed to provide an adequate remedy. The eminent domain sought by the Airport was after the fact since the harms had already occurred. This simply shows further

that the remediation aspects of § 1983, the previously held provisions of the Texas Constitution, and this Court's own recent pronouncements were inconsistent with the interpretation of community damages which were the essential basis of the Court's ruling and the Airport's position.

CONCLUSION

As shown above, this case provides a unique opportunity for the Court both to pursue issues raised recently in the *Palazzolo* case as well as to further define the entire range of questions concerning property rights and takings. Additionally, the court has the opportunity to forestall the incipient creation of quasi-immunity defense which will serve to abrogate or damage several lines of cases previously created by this Court, the Constitution and the statutes of the United States. The Texas Supreme Court has erred by misinterpreting its own Constitution and by allowing the enhancement of this new immunity to an extent that it is now in contravention of various federal rules and such must be corrected. The Court is also confronted directly with the issue of the right of the government to take people's property for its own benefit. While this is obviously a necessary requirement of government, our system and our entire notion of jurisprudence requires, when people are damaged in the name of all, that all of us owe to those people who are being made to bear the cost of the public good be fairly and justly compensated by the public and that they be treated fairly and justly in the process. As Justice Holmes observed in *Pennsylvania Coal v. Mahon*, a strong public desire to

improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, at 416; see also *Armstrong v. U.S.*, at 49.

Respectfully submitted,

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**Counsel of Record*

AFFIRMED; Opinion Filed January 17, 2001

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-99-01028-CV

JOE R. WILKINSON, ET AL., Appellants

V.

DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD, THE CITY OF DALLAS, and THE CITY OF FORT WORTH, Appellees

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On Appeal from the 160th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 94-9369-H

OPINION

Before Justices Morris, Wright, and Richter[1]
Opinion By Justice Morris

Hundreds of current and former homeowners in Irving, Texas sued Dallas/Fort Worth International Airport Board, the City of Dallas, and the City of Fort Worth for

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[1] The Honorable John Ovard, Retired, Court of Appeals, Fifth District of Texas at Dallas was a member of the original panel and participated in the submission of the case. Due to his retirement from the Court on July 31, 2000, J. Ovard did not participate in the issuance of this opinion. The Honorable Martin Richter succeeds J. Ovard and has reviewed the record and the briefs in this case.

damages.[2] Generally, they alleged their homes were "taken" and "damaged" by governmental actions in connection with a runway expansion project at Dallas/Fort Worth International Airport in violation of the Texas and United States Constitutions. The trial court granted summary judgment in favor of D/FW on all of the homeowners' claims. The homeowners appealed asserting the trial court erred in granting summary judgment against them. For the reasons that follow, we affirm the trial court's judgment.

I.

The appeal before us involves four separate lawsuits that were consolidated by the trial court on the parties' joint motion. Appellants in the *Wilkinson* lawsuit are or were homeowners in the Broadmoor Hills subdivision.[3]

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[2] We will refer to the three appellees collectively as "D/FW."

[3] *Wilkinson, et al. v. Dallas/Fort Worth International Airport Board, et al.*, Cause No. 94-9369-H. The appellants in this lawsuit include Joe R. Wilkinson, Mary Doreen Wilkinson, Wayne Musgrave, Jackie L. Musgrave, Wajidali S. Alladina, Laila W. Alladina, Kenneth F. Book, Debbie J. Book, Michael L. Bright, Gail L. Bright, Thomas V. Carroll, Parrie Jane Carroll, Gerard Catu, Rickey J. Chenault, Pam Chenault, Marzanne Claiborne, Rick D. Conley, Susan M. Conley, Esther Elizabeth Day, Ric Ellis, Mohammad Forghani, Stephan R. Fulce, Betty Jane Fulce, Dennis M. Goodrich, Walter L. Gregg, Rex W. Henegar, Abbie G. Henegar, William H. Hill, Carole A. Hill, Kathleen Eichelberger Hodnett, Kenneth R. Jordan, Carolyn S. Jordan, James T. Kahl, Homa B. Kahl, Bong Sun Kim, Philip Song, Janet Kinney, John Edward Kleman, Raylin A. Denise, Dorothy T. Ledbetter, D.Y. Lemaire, Gail D. Koch Lemaire, D.H. Lewter, Margie R. Lewter,

Appellants in the *Baker* lawsuit were homeowners in the Harrington Heights subdivision.[4] Some of the Harrington Heights homeowners voluntarily sold their property to the cities of Dallas and Fort Worth. The cities initiated

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Robert A. Lloyd, Gary W. McClelland, Mary A. McClelland, Ricky G. McCraney, Valerie J. Tarricone McCraney, Daniel C. Meyer, Carole B. Meyer, Charlsie Montgomery, Max M. Morgan, Kathryn Morgan, Jim Nation, Judy Nation, Walter M. Nolley, Debra Nolley, Virginia M. Parrish, Calbert Monte Perkins, Lynda J. Perkins, Tom L. Pressly, Jancheryl Nicholas Pressly, D. Charles Ratcliff, Steven J. Reynolds, Margaret J. Reynolds, Timothy Reynolds, Jesse Byron Rogers, Jr., Roberta Fallon Rogers, Clyde Roy, Simon Schilder, Theresia A. Schilder, Mark J. Seavert, Laura Ann Seavert, Milton W. Sick, Jr., Karen R. Sick, James W. Snider, Jr., Donna K. Snider, Manford J. Steele, Barbara A. Steele, Dung Ngoc Sun, Bang Ngoc Trinh, Dung Thi Bui, Garry Waldrum, Kimberly Waldrum, William E. Warner, Deborah T. Warner, Sharon A. Weston, Jean A. Rose, James M. Wheeler, Linda J. Wheeler, Cary Wilburn, Linda Wilburn, Lawrence W. Winkler, Kathryn Ann Winkler, Reginald D. Wray, Linda S. Wray, Bo Chu Yu, Shing Yin Yu, Max I. Larsen, Alvis Arthur, Sheila Arthur, Deborah Bacon, Donald Eicholz, Marilyn T. Eichholz, Abdulrahim Panchbhaya, Mahrunnisha Panchbhaya, Richard G. Durbin, and Linda Brand.

[4] *Baker, et al. v. Dallas/Fort Worth International Airport Board, et al*, Cause No. 94-9897-I. The appellants in this lawsuit include William D. Baker, Mary Baker, Bill Reid, Linda Reid, Frank J. Stangel, B.W. Bartlett, Paula Bartlett, Elmo M. Blount, Darlene S. Blount, John Flood, Martha Flood, Casey Foster, Kay Foster, Charlene Gilbert, Robert H. Haymes, Peggy M. Haymes, Donald L. Johnson, Virginia L. Johnson, Rex Lawson, Tammy Lawson, Jim Simpson, Homer Tompkins and Betty Tompkins, Patrick Moriarty, Susan Moriarty, Kingston Yong and Joy Yong.

eminent domain proceedings against the other Harrington Heights homeowners. Appellants in the *Barkis* lawsuit[5] as well as those in the *Vece* lawsuit[6] are or were homeowners in northwest Irving.

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[5] *Barkis, et. al. v. Dallas/Fort Worth International Airport Board, et al.*, Cause No. 96-1808-D. The appellants in this lawsuit include Pete Kenny Barkis, Debbie Barkis, Dorothy Allred, Robert Bateman, Jo Ann Bateman, Donald L. Brown, Elanora Brown, F. Larre Bryant, Charles David Coffey, Donna E. Coffey, Arnold D. Conley, Mary A. Conley, Bruce Monroe Crone, Jack Dehart, Doris Dehart, Donald B. Doherty, Lewis R. Feinberg, Dana M. Franklin, Benjamin Joseph Griffin, Connie L Griffin, William J. Harris, Sarah Lynn Harris, German Pittman Haymore, III, Linda Susan Haymore, Derrell D. High, Violet Northcutt High, John Hill, Lynn Hill, Douglas Kinser, Mozelle Kinser, Wayne Kirk, John Mammen, Theresa Mammen, Russell H. Orms, Barbara J. Orms, Roberta Oxford, Elvin B. Parchman, Mary Lou Parchman, Chan Park, Jung Park, Mary F. Phelps, Paul C. Staudt, Nelson D. Stewart, Lynn A. Stewart, William J. Sullivan, Margaret A. Sullivan, Millard F. Turner, M. David Wier, Nancy L. Wier, Allen Williams, Felicia Williams, Luther G. Wright, Juan B. Zurita, Marilyn A. Zurita, Thomas R. Hager, Wanda D. Hager, H. Davis Tubre, Jr., and Janis L. Tubre.

[6] *Vece, et al. v. Dallas/Fort Worth International Airport Board, et al.*, Cause No. 96-1813-G. The appellants in this lawsuit include John A. Vece, Diana M. Vece, Michael D. Baird, Connie Baird, Wallace G. Banks, II, Evelyn J. Banks, Bruce G. Bartlett, S. Anne Bartlett, Frank A. Bell, Mary A. Bell, Jack G. Benton, Debra K. Benton, George Chapman, Sharon L. Chapman, Philip Cornacchia, Jere W. Daykin, V. Sue Daykin, Presley W. Donaldson., Bobbie R. Donaldson, J. Brent Edwards, Sherrilynn B. Edwards, Jack Etchison, Barbara N. Etchison, Raul Garcia, Jr., Maria Louisa Garcia, James W. Green, Cheryle Dage Green, Carl W. Heady, Judy D. Heady, Kenneth P. Hill, Dorothy E. Hill, Earlene H. Hillard, Jerry A. Hitt, Susan B. Hitt, Ronald L. Hula, Judith Hula, John P. Hyde, Julia A. Hyde, Wesley Elden Jackson, Oscar Long, Anna Long, Cynthia D. Lutz, Gerald S. McCorkle,

II.

Appellants' complaints are varied, but generally arise out of three categories of activities related to the airport runway expansion: (1) D/FW's pre-condemnation actions and policies, (2) demolition of condemned properties and runway construction activities, and (3) overflights from the use of the completed runway. Underlying appellants' complaints are D/FW's initial announcement to expand the runway without the consent of adjacent home rule cities,[7] its extended court battle with the cities that followed, and its later successful efforts in obtaining a legislative amendment to proceed with the planned expansion.[8] Appellants assert that, through these actions,

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Carol F. McCorkle, John Medaille, Christine Medaille, Charlie E. Moreno, Karen A. Moreno, Robert Lynn Mullin, Linda Jean Mullin, Gary Patton, Donna Patton, Roy C. Reynolds, Judy C. Reynolds, Chris. C. Sanguinetti, Sheryl Sanguinetti, Larry Seeding, Linda Seedig, Arthur D. Sinclair, Sherry J. Sinclair, Henri D. Tatro, Jr., Mary L Tatro, Stephen Twenge, Jo Ann Twenge, Debra Warden, and Timothy Dale Warden.

[7] "Home rule cities" are self-governing and look to the legislature not for grants of power but only for restrictions on their powers. *MJR's Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 573 (Tex. App. – Dallas 1990, writ denied).

[8] The airport board sued the cities of Irving, Euless, and Grapevine claiming that it was not required to follow local zoning ordinances in connection with their runway expansion plans and had the right to condemn the cities' streets and roads under the municipal airports act. *See Dallas/Fort Worth Int'l Airport Bd. v. City of Irving*, 854 S.W.2d 161 (Tex. App. – Dallas 1993). This Court affirmed the trial court's summary judgment against the airport board. *Id.* After our opinion issued, however, the legislature amended the relevant portions of the municipal airports act. *See Dallas/Fort Worth Int'l Airport Bd., v. City of*

D/FW effectively took control over the subject area by creating a five-year period during which the homeowners had great difficulty selling or obtaining financing for their homes. Appellants also complain about D/FW's policies and decisions with respect to which homes would be condemned and the manner in which the demolition and construction proceeded. They assert D/FW made representations and promises it refused to keep with respect to which, and on what terms, homes would be condemned or included in what they described as the Runway Expansion Mitigation Program. Appellants also allege that during the period D/FW was seeking approval of the runway expansion project from the City of Irving or, alternatively, approval of the legislative amendment of the Texas Municipal Airport Act, D/FW pursued a sample mitigation program that resulted in a few homeowners being bought out at prices and relocation benefits that were much higher than those later offered to other property owners in the area. They contend D/FW acted in bad faith and with deliberate indifference to appellants' rights throughout the expansion. Lastly, they complain about the detrimental effects the use of the new runway has had on their property and persons.

According to their pleadings, all appellants seek damages for injuries caused by D/FW's alleged representations that there would be no compensation for property improvements after the announcement of the runway

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Irving, 868 S.W.2d 750 (Tex. 1993). The supreme court vacated our judgment and remanded the cause to the trial court for consideration of the legislative amendment. *Id.*

expansion project, its alleged bad faith premature announcement and delay associated with the runway expansion project, its "bad faith disregard of promises, appellants' rights under the law and applicable regulations," and its "indifference to appellants' rights of due process and fair dealing." The *Wilkinson, Vece,* and *Barkis* appellants specifically seek damages for D/FW's refusal to include their homes in the Runway Expansion Mitigation Program. These appellants also seek damages because of the use of the new runway, complaining flights over and adjacent to their homes cause noise, pollution, crash hazards, and disruption of their daily activities causing "economic, physical, and mental distress on these [appellants] and their properties." The *Wilkinson* and *Baker* appellants seek additional damages for the piecemeal destruction of their neighborhoods as well as adjacent neighborhoods, the "protracted bombardment and invasion of their homes and persons by noise, dust, traffic (of heavy trucks and construction equipment), vibration, and dislocation of vermin caused by the demolition of condemned homes," and injuries to their neighborhood park caused by the relocation of Valley View Lane. The *Wilkinson* appellants also seek compensation for injuries caused by the relocation of Valley View Lane, asserting the relocation created access difficulties and congestion to Carbon Road, the principal road into their subdivision. Finally, the *Barkis* appellants seek damages for D/FW's alleged failure to offer some appellants the same compensation offered to those in the sample mitigation program.

In the trial court below, three homeowner couples whose claims the parties considered to be representative

of all other appellants were selected as test cases.[9] Discovery on the test cases proceeded while the remaining homeowners' claims were abated. D/FW later moved for summary judgment on each of the test cases, generally asserting: (1) appellants failed to allege a cause of action under either state or federal law; (2) appellants' state constitutional claims were precluded by the community damage principle; (3) appellants had no evidence of any injury that would be compensable as a taking under the state or federal constitution; (4) appellants' federal claims were not ripe for adjudication; and (5) appellants who voluntarily sold their properties to the cities, or whose properties were the subject of an eminent domain proceeding, had waived or were estopped from pursuing their claims.[10]

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[9] Joe and Doreen Wilkinson were chosen as representatives for all plaintiffs in *Wilkinson,* Bill and Linda Reid represented the plaintiffs in *Baker,* and Juan and Marilyn Zurita were selected as representatives for the plaintiffs in *Barkis* and *Vece.*

[10] For convenience and clarity we have categorized D/FW's summary judgment grounds as indicated. For each test case, however, D/FW's motion for summary judgment presented a multitude of grounds for relief. By way of example, D/FW's motion for summary judgment in the Wilkinsons' lawsuit presented the following thirty grounds:

1. The Defendants are entitled to summary judgment as to all claims asserted in Count One because every injury alleged by the Wilkinsons is non-compensable community damage.

2. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the alleged "piecemeal demolition of homes in Harrington

The trial court granted D/FW summary judgment on the test cases without specifying the grounds relied on for

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Heights, instead of a subsequent, simultaneous removal or destruction of those homes" because Article 1, Section 17 of the Texas Constitution does not provide a cause of action for delays in the commencement or completion of a public works project.

3. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the alleged "piecemeal demolition of homes in Harrington Heights, instead of a subsequent simultaneous removal or destruction of those homes" because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way, not common to the entire area, as a proximate result of the alleged "piecemeal demolition of homes in Harrington Heights instead of a subsequent, simultaneous removal or destruction of those homes."

4. The Defendants are entitled to summary judgment as the Wilkinsons' claims based on the alleged "bombardment and invasion of the Plaintiffs' homes by noise, dust, traffic, (of heavy trucks and construction equipment), vibration and dislocation of vermin caused by the demolition of homes in Harrington Heights" because Article 1, Section 17 of the Texas Constitution does not provide a cause of action for inconvenience and annoyance attendant to the construction of a public works project.

5. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the alleged "bombardment and invasion of the Plaintiffs' homes by noise, dust, traffic (of heavy trucks and construction equipment), vibration and dislocation of vermin caused by the demolition of homes in Harrington

Heights" because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way, not common to the entire area, as a proximate result of the noise, inconvenience, and annoyance allegedly generated by the demolition of nearby homes or by construction activity.

6. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the alleged "relocation of Valley View Lane and the resulting diminished access to Carbon Road" because Article 1, Section 17 of the Texas Constitution does not provide a cause of action for diminished street access as the result of governmental activities, in the absence of pleading and proof that access to the Plaintiffs' property has been materially and substantially impaired.

7. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the alleged "relocation of Valley View Lane and the resulting diminished access to Carbon Road" because, after adequate time for discovery, there is no evidence that access to the Wilkinsons' property was materially and substantially impaired by the relocation of Valley View Lane or that their house was damaged in some unique way, not common to the entire area, as a proximate result of the relocation of Valley View Lane and the resulting diminished access to Carbon Road.

8. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the alleged "exposure of the neighborhood park to traffic, traffic fumes, noise and the attendant loss of quiet, seclusion and security to the users of the park" because Article 1, Section 17 of the Texas Constitution does not provided the Wilkinsons a cause of action for damage to property not owned by them.

9. The Defendants are entitled to summary judgment as the Wilkinsons' claims based on the alleged "exposure of the neighborhood park to traffic, traffic fumes, noise and the attendant loss of quiet, seclusion and security to the users of the park" because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way, not common to the entire area, as a proximate result of "exposure of the neighborhood park to traffic, traffic fumes, noise and the attendant loss of quiet, seclusion and security to the users of the park.

10. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the alleged refusal to include the Plaintiffs neighborhood in the Runway Expansion Mitigation Program" because Article 1, Section 17 of the Texas Constitution does not provide a cause of action for a governmental agency's refusal to extend benefits to a particular group of individuals.

11. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the alleged "refusal to include the Plaintiffs' neighborhood in the "Runway Expansion Mitigation Program" because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way, not common to the entire area, as a proximate result of the Defendants' refusal to include the Wilkinsons' neighborhood in the Runway Expansion Mitigation Program.

12. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "representations to the Plaintiffs that the Plaintiffs would not be compensated for improvements or significant repairs made after the

announcement of the Runway Expansion Project" because Article 1, Section 17 of the Texas Constitution does not provide a cause of action for a governmental entity's misrepresentations.

13. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "representations to the Plaintiffs that the Plaintiffs would not be compensated for improvements or significant repairs made after the announcement of the Runway Expansion Project" because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way not common to the entire area, as a proximate result of the Defendants' alleged representations to the Wilkinsons that the Wilkinsons would not be compensated for improvements or significant repairs made after the announcement of the Runway Expansion Project.

14. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "bad faith and premature announcement of the Runway Expansion Project without authority to carry out that expansion and the resultant delays" because Article 1, Section 17 of the Texas Constitution does not provide a cause of action for economic harm caused by the announcement of a public works project or for delays in the commencement or completion of public works projects.

15. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "bad faith and premature announcement of the Runway expansion project without authority to carry out that expansion and resultant delays because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way not common to the entire

area, as a proximate result of the announcement of the project or as a proximate result of delays in the commencement or completion of the project."

16. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "bad faith disregard of promises made" because Article 1, Section 17 of the Texas Constitution does not provide a cause of action for a governmental entity's breach of promise.

17. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "bad faith disregard of promises made" because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way, not common to the entire area, as a proximate result of the Defendants' alleged bad faith disregard of promises made to the Wilkinsons.

18. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "disregard of rights under the law and applicable regulations" because Article 1, Section 17 of the Texas Constitution "does not provide a cause of action for a governmental entity's disregard of rights under the law and applicable regulations."

19. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "disregard of rights under the law and applicable regulations" because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way, not common to the entire area, as a proximate result of the Defendants' alleged disregard of the Wilkinsons' rights. 20. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "indifference to rights of due

process and fair dealing" because Article 1, Section 17 of the Texas Constitution does not provide a cause of action for a governmental entity's "indifference to rights of due process and fair dealing."

21. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on the Defendants' alleged "indifference to rights of due process and fair dealing" because, after adequate time for discovery, there is no evidence that the Wilkinsons' house was damaged in some unique way, not common to the entire area, as a proximate result of the Defendants' alleged "indifference to rights of due process and fair dealing."

22. The Defendants are entitled to summary judgment as to the Wilkinsons' claims that the Defendants took the Wilkinsons' property without just compensation, because that claim is not ripe for adjudication in the absence of pleading and proof that state law has failed to provide an adequate remedy.

23. The Defendants are entitled to summary judgment as to the Wilkinsons' claims that the Defendants took the Wilkinsons' property without just compensation, because the Defendants (sic) have not alleged that the Defendants physically invaded the Wilkinsons' property or that the Defendants have deprived the Wilkinsons of all economically beneficial uses of their property.

24. The Defendants are entitled to summary judgment as to the Wilkinsons' claims that the Defendants took the Wilkinsons' property without just compensation because, after adequate time for discovery, there is no evidence that the Defendants' alleged actions physically invaded the Wilkinson's property or deprived the Wilkinsons of all economically beneficial use of their property.

25. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on Texas Government Code Chapter 2007 because the Defendants' alleged acts were not first proposed on or after September 1, 1995.

26. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on Texas Government Code Chapter 2007 because, after adequate time for discovery, there is no evidence that the value of the Wilkinsons' property has been reduced by at least 25 percent of its market value.

27. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on physical and mental, emotional distress because, in actions brought under the Just Compensation Clause of the Fifth Amendment, damages are limited to the fair market value of the property taken.

28. The Defendants are entitled to summary judgment as to the Wilkinson' claims based on physical, mental, and emotional distress because the Defendants have sovereign immunity to these claims.

29. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on mental and physical distress because there is no cause of action for negligent infliction of emotional distress, and the Wilkinsons have failed to plead an essential element of a claim for intentional infliction of emotional distress.

30. The Defendants are entitled to summary judgment as to the Wilkinsons' claims based on physical and emotional distress because, after adequate time for discovery, there is no evidence that the Wilkinsons suffered any bodily injury as the proximate result of

its ruling. D/FW later moved for and was granted summary judgment against the remaining homeowners.[11] This appeal ensued.

Although there is a single appeal encompassing the four lawsuits, the parties have filed separate briefs for each underlying case. Because of the similarities among the pleadings and evidence involved, however, many of the issues and arguments are common to all appellants. To avoid repetition, we have structured our analysis in terms of general issues raised by the numerous summary judgment grounds, focusing first on common issues. We address issues relating to particular groups of appellants only to the extent our resolution of common issues is not dispositive.

Also, we note that many of D/FW's summary judgment grounds were based solely on appellants' pleadings. Our record indicates D/FW raised several of these summary judgment grounds in the *Baker* lawsuit by way of special exceptions. The trial court sustained these exceptions resulting in the amended petition now before us. D/FW also filed special exceptions in the *Wilkinson* case.

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any act or omission of the Defendants, and no evidence that, as a proximate result of the Defendants' acts or omissions, the Wilkinsons have suffered mental anguish to such level as to render them incapable of dealing with everyday activities.

[11] D/FW's motions for summary judgments with respect to the remaining appellants mirrored those of the test cases.

But our record contains no ruling or order on these special exceptions.

Generally, a movant must specially except before urging a motion for summary judgment that alleges a failure to state a claim, thereby giving the plaintiff an opportunity to amend deficient pleadings. *See Salmon v. Miller,* 958 S.W.2d 424, 429 (Tex. App. – Texarkana 1997, writ denied). But if the plaintiff's pleadings establish the lack of a cause of action, or allege facts that even if proven fail to establish liability, special exceptions are not required and summary judgment may be granted on pleadings alone. *Id.* To the extent D/FW's motion for summary judgment is based on appellants' pleadings, it appears to rely upon this exception to the general rule. Appellants do not object to D/FW's summary judgment grounds directed to appellants' pleadings or argue that special exceptions were the proper vehicle for such challenges. Instead, they generally argue their allegations support causes of action under the theories pleaded. We therefore examine the merits of D/FW's summary judgment grounds assuming all allegations and facts in appellants' pleadings are true. *See Abbott v. City of Kaufman,* 717 S.W.2d 927, 929 (Tex. App. – Tyler 1986, writ dism'd).

When the trial court fails to specify the grounds relied on for its ruling, we may affirm the judgment on any meritorious theory advanced. *See State Farm Fire & Casualty Co. v. S.S.,* 858 S.W.2d 374, 380 (Tex. 1993). To succeed on appeal, appellants must therefore establish that each of D/FW's grounds is insufficient to support summary judgment. *See Malooly Bros. Inc. v. Napier,* 461 S.W.2d 119, 121 (Tex. 1970).

III.

We begin our analysis with D/FW's summary judgment grounds addressing appellants' inverse condemnation claims under the Texas Constitution. D/FW sought summary judgment on these claims generally asserting: (1) all injuries alleged by appellants were noncompensable community damages; (2) appellants' pleadings failed to state a cause of action under article one, section seventeen of the Texas Constitution; and (3) there was no evidence that appellants' properties were damaged in some unique way, not common to the entire area, as a result of any of the actions or conduct attributed to D/FW.

Article one, section seventeen of the Texas Constitution requires adequate compensation be paid to those whose property is "taken, damaged, or destroyed for or applied to the public use." TEX. CONST. art I, § 17. To state a cause of action for inverse condemnation under this section, appellants must allege (1) an intentional governmental act, (2) resulting in the taking, damaging, or destruction of their property, (3) for public use. *See Steele v. City of Houston*, 603 S.W.2d 786, 788-91 (Tex. 1980); *Barto Watson, Inc. v. City of Houston*, 998 S.W.2d 637, 640 (Tex. App. – Houston [1st Dist.] 1999, pet. denied). D/FW's summary judgment grounds generally focus on the second element above, asserting appellants have failed to allege or provide evidence of a compensable taking or damaging.

Whether there has been a taking or damaging of property in the constitutional sense is a question of law. *See Mayhew v. Sunnyvale*, 964 S.W.2d 922, 932-33, (Tex.

1998), (whether zoning ordinance constitutes compensable taking), *cert. denied*, 526 U.S. 1144 (1999); *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996) (whether access rights were materially and substantially impaired from highway expansion project requiring compensation under Texas Constitution); *Barto Watson, Inc.*, 998 S.W.2d 637 (whether city's act of shutting down sand pit on mistaken belief that permit was required was a taking). Nonetheless, to succeed on a claim for inverse condemnation under the takings clause of the Texas Constitution, appellants must establish either (1) an actual physical appropriation or invasion of the property, or (2) an unreasonable interference with the landowner's right to use and enjoy the property. *See Westgate Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992); *DuPuy v. City of Waco*, 396 S.W.2d 103, 108-09 (Tex. 1965). Proving merely that governmental action has caused a diminution in value or damaged the marketability of property is insufficient. *See Westgate*, 843 S.W.2d at 452 (no compensation required for economic damage to property caused by government's proposal to condemn in future); *Allen v. City of Texas City*, 775 S.W.2d 863, 865 (Tex. App. – Houston [1st Dist.] 1989, writ denied) (no compensation for construction of levee which caused decrease in property value or increased susceptibility to flooding).

Because the Texas Constitution does not require compensation for every decrease in market value attributable to intentional governmental activity, the nature of the injury forming the basis of a damage claim under article one, section seventeen is critical to determining whether a compensable taking or damaging has occurred. *See Felts v. Harris County*, 915 S.W.2d 482, 484 (Tex. 1996). This

concept is reflected in the community damage rule. That rule permits compensation for only special injuries, not suffered by the community in general, as result of the governmental action. *Id.* Because community damages are not connected with the landowner's property rights, they are not compensable as a taking or damaging of property. *See id.* at 485. In fact, even though construction of a public work may cause injury to the public and practically destroy the value of the property in a town, a landowner would not be entitled to compensation for the diminution of his property values from these community injuries caused by such construction if the project was built with legislative permission. *See Gulf, Colo. & Santa Fe Ry. v. Fuller* 63 Tex. 467, 470-71 (1885), *quoted in Felts*, 915 S.W.2d at 484-85. The mere fact that injury is common to everyone in a particular area, however, does not bar recovery. *See State v. Schmidt*, 867 S.W.2d 769, 780 (Tex. 1993). A property owner must therefore allege and prove injuries to his property different from those sustained by the community as a whole to establish a compensable injury under article one, section seventeen. *Felts*, 915 S.W.2d at 484-85.

Although the concept of community damage has existed for over one hundred years, the principle is not always easy to apply.[12] Similar damages experienced by

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[12] Section 21.042 of the property code also provides that the assessment of damages in eminent domain cases may not include injuries or benefits the property owner experiences in common with the general community. TEX.PROP.CODE ANN. § 21.042(d) (Vernon Supp.2001).

all or most of the properties in a given area is the "quintessential notion of community damages." *Felts*, 915 S.W.2d at 485. In determining whether an alleged injury is special or community in nature, we focus on the nature of the alleged injuries to determine whether they are suffered by the community at large or whether they affect the landowner's property in some special or unique way. *See Schmidt*, 867 S.W.2d at 781. The Texas Supreme Court has previously concluded diminution to property values caused by diversion of traffic, inconvenience of access, impaired visibility of ground level buildings, and disruption by construction activities from the conversion of a roadway, were community damages absent allegations these injuries affected a particular parcel in some unique or different way from the surrounding area. *See id.; State v. Allen*, 870 S.W.2d 1, 1-2 (Tex. 1994).

The supreme court in *Felts* reached a similar conclusion with respect to a landowner's inverse condemnation claim based solely on traffic noise from the operation of a newly constructed parkway adjacent to his property. *See Felts*, 915 S.W.2d at 484. Unpersuaded by the Feltses' attempts to characterize their noise damage as special or unique based on the noise level they experienced because of their proximity to the new roadway, the Court determined the noise damage sustained by the Feltses was no different in kind from that experienced by their neighbors or the entire community and, therefore, was not compensable. *Id.* at 485-86.

In *State v. Heal*, however, the supreme court held that diminution in value caused by impaired access to property from increased traffic and a bottleneck in connection with a highway expansion project was not community

damage. *Heal,* 917 S.W.2d at 8-9. The court noted impaired access was a different kind of injury than mere circuity of travel, which the court concluded was community damage three years earlier in *Schmidt. Id.* at 9. Instead, impaired access may constitute special damage because access to one's land is a property right. *See Heal,* 917 S.W.2d at 9-10.

It is with these basic principles of Texas inverse condemnation law in mind that we analyze appellants' specific claims under article one, section seventeen to determine whether D/FW conclusively established their entitlement to summary judgment based on appellants' failure to allege compensable taking or damaging. In doing so, we apply the well-known standards applicable to the review of summary judgments. *See Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548 (Tex. 1985).

IV.

We first address appellants' inverse condemnation claims based on D/FW's alleged (1) bad faith and premature announcement of the runway expansion project, (2) refusal to include certain landowners in the mitigation program, (3) representations with respect to what repairs or improvements on homes slated for condemnation would be compensated, (4) failure to provide the same benefits offered to those in the sample mitigation program, (5) D/FW's representations that appellants would not be compensated for improvements or significant repairs made after the announcement of the project, (6) the delay in carrying out the expansion, (7) destruction and deterioration of their neighborhoods and adjacent

neighborhoods, (8) bad faith disregard of promises made to appellants, (9) disregard of rights under the law and regulations, and (10) indifference to rights of due process and fair dealing. Appellants generally argue that through these actions, D/FW took legal and physical control over their properties, deeply affecting their property values.

We do not agree that these complaints implicate a direct restriction imposed by D/FW on the use of appellants' property. Although these actions may have caused a decrease in the market value of appellants' properties, and may have even changed the character of their neighborhood, absent an allegation that D/FW actually physically or legally restricted appellants' use of their properties, these claims cannot form the basis for recovery under article one, section seventeen. *See Westgate Ltd.*, 843 S.W.2d at 452.

Moreover, appellants' pleadings fail to state that D/FW's alleged conduct affected their individual properties in some special or unique way different from the community as a whole or suggest a severe impairment of their ownership interest in the property. *See Felts*, 915 S.W.2d at 486 n. 5. To the contrary, appellants' pleadings clearly focus on injuries suffered by their entire neighborhood, which in turn caused damage to their property values. These injuries are not compensable under article one, section seventeen in accordance with the community damage principle as stated above.

Appellants also seek damages for injuries caused by the "protracted bombardment and invasion of their homes and persons by noise, dust, traffic (of heavy trucks and construction equipment), vibration, and dislocation

of vermin caused by the demolition of the condemned homes," as well as "the piecemeal demolition of homes in Harrington Heights instead of a subsequent, simultaneous removal or destruction of those homes." Appellants assert that their claims based on runway-related construction and demolition sufficiently allege a physical appropriation or actual invasion of their property requiring compensation under the Texas Constitution. Although noise, dust, vibrations, insects, and vermin may have physically entered their property from condemned properties, appellants have cited no case, and we have found none, recognizing these types of temporary interferences as a physical governmental appropriation of private property entitling appellants to compensation under article one, section seventeen.

In fact, the supreme court has repeatedly indicated damages for noise, dust, increased traffic, and other inconveniences incident to the construction of a highway are not compensable under article one, section seventeen under the community damage principle. *See Felts*, 915 S.W.2d at 485; *Schmidt*, 867 S.W.2d at 775. We perceive no distinction between appellants' injury allegations relating to the effects from the demolition and construction and those the supreme court has already held to be noncompensable in the context of highway construction.

We are also unpersuaded by appellants' attempt to equate these injury allegations with stating a cause of action under article one, section seventeen based on a nuisance theory. Unlike the cases permitting compensation under that theory, appellants seek damages related to temporary construction activities and not for permanent injuries to their ownership interest or property

values caused by the normal operation of a public work. *See City of Abilene v. Downs*, 367 S.W.2d 153 (Tex. 1963) (operation of sewage disposal plant); *Gainesville, H. & W. R.R. v. Hall*, 78 Tex. 169, 14 S.W. 259 (1890) (operation of railroad). We therefore conclude that appellants' damage claims based on noise, dust, traffic, vibration, and dislocation of vermin caused by construction and demolition related to the runway expansion project do not allege a compensable taking or damaging under article one, section seventeen. In reaching this conclusion, we do not suggest a plaintiff may never recover for injuries caused by such conditions, but simply conclude appellants' allegations generally complaining of these conditions have not alleged an interference with their individual property rights sufficient to overcome the community damage principle and establish a compensable injury.

Appellants also assert damage claims based on the relocation of Valley View Lane. The *Wilkinson* appellants in particular complain the road relocation diminished access to Carbon Road, the primary road to their subdivision. In *Heal*, the supreme court noted that impaired access to property is not a community injury, but instead is special damage that may be compensable under article one, section seventeen if access rights have been materially and substantially impaired. *See Heal*, 917 S.W.2d at 9. As we construe appellants' complaint, however, they do not allege a material and substantial impairment of access to their property, but instead merely complain of diminished access to a community road. Appellants have provided no authority, and we have found none, holding that a landowner has a property right to a particular road to access his property. In the absence of an allegation that

the diminished access to Carbon Road materially and substantially affected appellants' access rights to their property, this alleged injury cannot form the basis of a compensable taking or damaging. *See Heal*, 917 S.W.2d at 9.

The *Wilkinson* and *Barkis* appellants claim a park near their home was also damaged by the road relocation by "exposing it to traffic, traffic fumes, noise, and a loss of quiet and seclusion to the users of the park." Even assuming appellants may assert a claim based on a taking or damaging to the park, the nature of the injuries alleged arise from the park's increased proximity to a major road. Proximity is not the controlling issue in determining whether appellants' alleged injuries are compensable as special or unique injuries. *See Schmidt*, 867 S.W.2d at 781. Appellants' alleged injuries are shared with all other properties now fronting the relocated road and not specific to the park and, therefore, are not compensable as community damages under article one, section seventeen. *See State v. Interstate Northborough Partnership*, 8 S.W.3d 4, 13 (Tex. App. – Houston [14th Dist.] 1999, pet. granted).

Relying on *City of Houston v. McFadden*, 420 S.W.2d 811, (Tex. App. – Houston [14th Dist.] 1967, writ ref'd n.r.e.), appellants also argue that the community damage principle is inapplicable to their claims because "it has been held that actions concerning airports are an obvious exception to community damages because of the specific and unique nature of activities and effects of airport operation adjacent to landowners." *McFadden* simply does not stand for such a broad proposition. Instead, *McFadden* merely confirms that a cognizable claim for damages under article one, section seventeen may be

based on the taking of an air easement when frequent and low aircraft flights over a landowner's property interfere with its use and decrease its value. *Id.* at 813-14. Because appellants' damage claims addressed above involve pre-condemnation activities, demolition, and construction effects, *McFadden* does not apply to these claims.

The appellants in *Wilkinson*, *Barkis*, and *Vece*, however, contend they have alleged a damage claim based on injuries caused by aircraft overflights, which necessarily take place after the demolition and construction. As noted above, an inverse condemnation claim based on the physical intrusion of aircraft into the airspace directly over a landowners' property may constitute a compensable "taking" of an air easement under state and federal law entitling the property owner to damages. *See City of Austin v. Travis County Landfill Co., L.L.C.*, 25 S.W.3d 191, 198-99 (Tex. App. – Austin, no pet.); *McFadden*, 420 S.W.2d at 814. To constitute a compensable taking, however, the overflights must be frequent and low, causing a direct, immediate, and substantial interference with the property owner's use and enjoyment of the land. *See Travis County Landfill Co.*, 25 S.W.3d at 198. Absent evidence of an invasion by a sufficient number of airplanes so as to cause such an interference, the injury complained of is nothing more than the same injury to which every property owner in the area is subjected and is therefore not a taking, but a noncompensable community injury. *See Moore v. United States*, 185 F.Supp. 399, 400-01 (N.D.Texas, 1960).

In their pleadings, appellants seek damages from flights over and adjacent to their property causing noise

above projected levels, pollution, crash hazards, and disruption of their daily activities. D/FW claims cases involving the taking of air easements do not apply here because appellants' damage claims arise merely from the general use of the new runway and are based on injuries suffered by every property owner in the area surrounding the runway. After reviewing appellants' pleadings, we agree with D/FW. Despite appellants' characterizations to the contrary, their allegations regarding overflights are not based on a physical invasion of the airspace immediately over their individual properties causing interference with their use of property, but are based on the noise, pollution, and disruption of daily activities generally caused by the use of the new runway. In arguing that the community damage principle does not apply to these claims, appellants merely assert the damage suffered by these subdivisions from these flights is different from the damage suffered by other communities in the area. We conclude these allegations are insufficient as a matter of law to constitute an interference with appellants' individual property rights such as to entitle them to compensation under article one, section seventeen based on the taking of an air easement. The mere fact that the noise and other inconveniences of which appellants complain are caused by aircraft is not enough to transform these allegations into a claim for a taking of an air easement and avoid the community damage rule. Instead, the very nature of appellants' complaints suggest the elements of injuries for which they seek compensation are the type experienced by every other property owner

in the community which, as noted in *Felts*, is the "quintessential notion of community damages." *Felts*, 915 S.W.2d at 485.

In concluding the community damage principle bars many of appellants' state constitutional claims, we necessarily reject appellants' argument that the community damage principle is tantamount to an assertion of immunity, inapplicable to a cause of action asserted under article one, section seventeen. Instead, the community damage principle determines whether the nature of the injury forming the basis of the damage claim may constitute a compensable "taking" or "damaging" in accordance with article one, section seventeen. As such, we conclude appellants' argument is meritless.

We are also unpersuaded by appellants' contention that the determination of whether their alleged injuries constitute noncompensable community damages is necessarily a fact issue and, therefore, inappropriate for summary disposition. Of course, a plaintiff may plead an injury that cannot be classified as community damages as a matter of law. *See, e.g., Hall*, 14 S.W. 259. Contrary to appellants assertions, however, *Hall* does not hold that whether a particular injury constitutes community damage is always a question for the trier of fact. Here, the very nature of appellants' alleged injuries indicates they do not involve an interference with a particular property right, but instead are damages shared by the community at large. In such a case, summary judgment based on the community damage principle is appropriate.

V.

Appellants also assert their pleadings support a claim for a bad faith taking as recognized by the supreme court in *Westgate*. We do not agree. In *Westgate*, a landowner filed a counterclaim for inverse condemnation in response to the state's eminent domain proceeding. *Westgate*, 843 S.W.2d at 450. The landowner claimed the government appropriated his property before actually acquiring it through eminent domain procedures by failing to warn of the highway expansion before the landowner built a shopping center on the property and by unreasonably delaying the acquisition of his property after announcing the proposal to condemn the property. *Westgate*, 843 S.W.2d at 451. Contrary to appellants' assertions, the *Westgate* court did not recognize a cause of action for bad faith delay. In fact, the court specifically declined to address whether a landowner may state a cause of action for inverse condemnation where the condemning authority acts in bad faith to cause economic damage to the landowner. *Id.* at 454. Instead, the court merely indicated the policy reasons supporting its decision to reject an inverse condemnation claim based on an unreasonable delay might not apply if the condemning authority delays a condemnation proceeding in bad faith to cause economic damage to the landowner. *Id.*

Appellants' complaints do not focus on delays in the actual acquisition of property by the condemning authority as alleged in *Westgate*. *See id.* Instead, their allegations focus on the depression of their property values caused by pre-condemnation activities after the initial announcement of the project. They essentially argue D/FW should never have announced the project when it did because it

did not have the condemnation authority to proceed with the project at that time. They also complain of D/FW's use of certain properties as pawns in its political battle, denying some property owners mitigation and awarding others extremely beneficial compensation packages. As we construe appellants' pleadings, none of their allegations implicate the concerns raised in *Westgate* or justify a departure from the general rule requiring a current and direct restriction on the property's use to establish a compensable taking or damaging under article one, section seventeen. Accordingly, we conclude appellants' contention is without merit.

VI.

In addition to their takings claims under the Texas Constitution, appellants in *Vece, Barkis* and *Wilkinson* asserted a statutory takings claim based on the Private Real Property Rights Preservation Act. *See* TEX. GOV'T CODE ANN. § 2007.001-.045 (Vernon Pamph.2001). Appellants assert the trial court erred by granting summary judgment on these claims because they dropped these claims before the trial court ruled on D/FW's motion for summary judgment. Apart from this conclusory assertion, appellants put forth no argument, authority, or record citations to support this contention, nor do they indicate how they were harmed by this alleged error. It is not our function to independently review the record and research the applicable law to determine whether this complaint presents reversible error. Because appellants have failed to provide us with the argument and authority necessary to make this appellate complaint viable, we consider this contention waived. *See* TEX.R.APP.P. 38.1(h).

Appellants also assert their pleadings support a claim for damages under 42 U.S.C. § 1983 based on violations of the takings clause of the Fifth Amendment to the U.S. Constitution. D/FW moved for summary judgment on appellants' federal claims contending (1) these claims were not ripe for adjudication absent pleading and proof that state law failed to provide an adequate remedy, (2) appellants failed to allege a physical invasion or deprivation of all economically beneficial use of their property, and (3) after an adequate time for discovery, there is no evidence of a physical appropriation or deprivation of all economically beneficial use of the property.

Appellants initially claim they have alleged a cognizable taking under the federal constitution in the form of a physical invasion based on the projection of dirt, dust, blast effects from construction activities and noise from the runway's use.[13] Appellants have not cited a single case that recognizes a federal taking based on such claims or provided any argument to support this conclusion. In the absence of any authority or argument with respect to how these allegations support a cause of action under the federal takings clause, we consider this contention waived on appeal. *See* TEX.R.APP.P. 38.1(h).

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[13] To the extent appellants assert their overflight allegations involving the use of the new runway are also sufficient to state a taking under the Fifth Amendment, we perceive no distinction between the state and federal constitutional requirements for alleging a cognizable claim based on the taking of an air easement. We therefore reject this claim for the reasons previously stated.

Appellants also assert federal law does not require specific physical contact or a total taking to assert a cognizable taking claim under the Fifth Amendment. Relying on *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and other regulatory takings cases, appellants urge that a cognizable federal takings claim can be based on the unreasonable diminution of investment-backed expectations and that their pleadings suggest such a taking. We agree with appellants' general contention that a Fifth Amendment taking may arise in the absence of a physical intrusion. A zoning ordinance may effect a taking if it deprives an owner of all economically viable uses of his land. *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Similarly, under some circumstances, a land use regulation that severely interferes with an owner's "distinct investment backed expectations" may give rise to a taking. *See Penn Central*, 438 U.S. at 124. But we are aware of no case concluding a taking occurred based solely on the diminution or fluctuations of property values in the absence of a significant interference with a landowner's property interests. To the extent appellants allege a taking based on D/FW's pre-condemnation proceedings without restricting appellants' use of their property, such claims have been routinely rejected by federal courts. *See Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 15 (1984); *Saffold v. Carter*, 739 F.Supp. 1541, 1544 (S.D.Ga. 1990). Appellants' allegations fail to establish a cognizable taking under the Fifth Amendment. The trial court did not err in granting D/FW summary judgment on these claims.

Appellants also argue that D/FW's failure to address specifically in their summary judgment motions appellants' claim under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution compels reversal of the trial court's judgment with respect to this cause of action. Other than a conclusory assertion that they alleged an equal protection claim based on the airport's failure to treat certain people on an equal basis, appellants have not included any citation of authority, discussion of the facts, or argument to support this contention. Their failure to do so has waived this alleged error on appeal. *See* TEX.R.APP.P. 38.1(h). Regardless, even absent waiver, we conclude there is no merit to this contention for the following reasons.

The Equal Protection Clause of the Fourteenth Amendment requires that all persons similarly situated be treated alike. *See City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 439 (1985). To state a claim of selective treatment, however, a plaintiff must establish (1) the person compared with others similarly situated was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person. *See Wayte v. United States*, 470 U.S. 598, 608-09 (1985).

Appellants' pleadings contain allegations complaining that D/FW, in bad faith, bought out a few homeowners in a sample mitigation program at prices and relocation benefits that were much higher than those ultimately offered to other owners in the area affected by the airport expansion. Their pleadings further allege that

" . . . in order to secure fair and equal treatment under the law and thus, due process, the earlier offers of purchase and mitigation and the compensation levels of the sample mitigation must be extended to all affected parties equally in order to ensure equity and to negate the affect of the bad faith on the part of the Airport." Although these allegations may suggest disparate treatment, they do not allege discriminatory treatment based on an impermissible factor, the prevention of the exercise of a constitutional right, or a malicious or bad faith intent to injure. As such, appellants failed to state an equal protection claim for selective treatment.

Appellants also claim that D/FW's failure to address specifically their cause of action under 42 U.S.C. § 1983 requires reversal of the trial court's summary judgment. Section 1983 is a remedial statute designed to vindicate a federal constitutional injury. *See Albright v. Oliver,* 510 U.S. 266, 269-71 (1994). It does not create any substantive rights. *See Levine v. Maverick County Water Control,* 884 S.W.2d 790, 795 (Tex. App. – San Antonio 1994, writ denied). Having concluded appellants' pleadings failed to allege a viable federal constitutional injury, their section 1983 damage claims necessarily fail as a matter of law.

VII.

In conclusion, we hold appellants' pleadings fail to state a cognizable taking or damaging claim under the Texas Constitution because the injuries they allege, as a matter of law, are not compensable as a taking or damaging under article one, section seventeen. Appellants'

damage claims under section 1983 also fail because their pleadings do not establish a viable federal constitutional injury. Because the trial court's judgment can be affirmed on these grounds, we need not address appellants' arguments relating to D/FW's remaining summary judgment grounds.

We affirm the trial court's judgment.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
JUSTICE

Do Not Publish
TEX.R.APP.P.47

(LOGO)

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOE R. WILKINSON, ET AL., Appellants

No. 05-99-01028-CV V.

DALLAS/FORT-WORTH INTERNATIONAL AIRPORT BOARD, THE CITY OF DALLAS AND THE CITY OF FORT WORTH, Appellees

Appeal from the 160th Judicial District Court of Dallas County, Texas. (Tr.Ct.No. 94-9369-H).

Opinion delivered by Justice Morris, Justices Wright and Richter participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellee Dallas/Fort Worth International Airport Board, the City of Dallas and the City of Fort Worth recover their costs of this appeal from appellants Joe R. Wilkinson, Mary Doreen Wilkinson, Wayne Musgrave, Jackie L. Musgrave, Wajidali S. Aliadina, Laila W. Aliadina, Kenneth F. Book, Debbie J. Book, Michael L. Bright, Gail L. Bright, Thomas V. Carroll, Parrie Jane Carroll, Gerard Catu, Rickey J. Chenault, Pam Chenault, Marzanne Claiborne, Rick D. Conley, Susan M. Conley, Esther Elizabeth Day, Ric Ellis, Mohammad Forghani, Stephan R. Fulce, Betty Jane Fulce, Dennis M. Goodrich, Walter L. Gregg, Rex W. Henegar, Abbie G. Henegar, William H. Hill, Carole A. Hill, Kathleen Eichelberger Hodnett, Kenneth R. Jordan, Carolyn S. Jordan, James T. Kahl, Homa B. Kahl, Bong Sun Kim, Philip Song, Janet Kinney, John Edward Kleman, Raylin A. Denise, Dorothy

T. Ledbetter, D. Y. Lemaire, Gail D. Koch Lemaire, D. H. Lewter, Margie R. Lewter, Robert A. Lloyd, Gary W. McClelland, Mary A. McClelland, Ricky G. McCraney, Valerie J. Tarricone McCraney, Daniel C. Meyer, Carole B. Meyer, Charlsie Montgomery, Max M. Morgan, Kathryn Morgan, Jim Nation, Judy Nation, Walter M. Nolley, Debra Nolley, Virginia M. Parrish, Calbert Monte Perkins, Lynda J. Perkins, Tom L. Pressly, Jancheryl Nicholas Pressly, D. Charles Ratliff, Steven J. Reynolds, Margaret J. Reynolds, Timothy Reynolds, Jesse Byron Rogers, Jr., Roberta Fallon Rogers, Clyde Roy, Simon Schilder, Therosia A. Schilder, Mark J. Seavert, Laura Ann Seavert, Milton W. Sick, Jr., Karen R. Sick, James W. Snider, Jr., Donna K. Snider, Manford J. Steele, Barbara A. Steele, Dung Ngoc Sun, Bang Ngoc Trinh, Dung Thi Bui, Garry Waldrum, Kimberly Waldrum, William E. Warner, Deborah T. Warner, Sharon A. Weston, Jean A. Rose, James M. Wheeler, Linda J. Wheeler, Cary Wilburn, Linda Wilburn, Lawrence W. Winkler, Kathryn Ann Winkler, Reginald D. Wray, Linda S. Wray, Bo Chu Yu, Shing Yin Yu, Max I. Larsen, Alvis Arthur, Sheila Arthur, Deborah Bacon, Donald L. Eicholz, Marilyn T. Eicholz, Abdulrahim Panchbhaya, Mahrunnisha Panchbhaya, Richard G. Durbin, Linda Brand, William D. Baker, Mary Baker, Bill Reid, Linda Reid, Frank J. Stangel, B. W. Bartlett, Paula Bartlett, Elmo M. Blount, Darlene S. Blount, John Flood, Martha Flood, Casey Foster, Kay Foster, Charlene Gilbert, Robert H. Haymes, Peggy M. Haymes, Donald L. Johnson, Virginia L. Johnson, Rex Lawson, Tammy Lawson, Jim Simpson, Homer Tompkins and Betty Tompkins, Patrick Moriarty, Susan Moriarty, Kingston Yong, Joy Yong, Pete Kenny Barkis, Debbie Barkis,

Dorothy Allred, Robert Bateman, Jo Ann Bateman, Donald L. Brown, Elanora Brown, F. Larre Bryant, Charles David Coffey, Donna E. Coffey, Arnold D. Conley, Mary A. Conley, Bruce Monroe Crone, Jack Dehart, Doris Dehart, Donald B. Doherty, Lewis R. Feinberg, Dana M. Franklin, Benjamin Joseph Griffin, Connie L. Griffin, William J. Harris, Sarah Lynn Harris, German Pittman Haymore, III, Linda Susan Haymore, Derrell D. High, Violet Northcutt High, John Hill, Lynn Hill, Douglas Kinser, Mozelle Kinser, Wayne Kirk, John Mammen, Theresa Mammen, Russell H. Orms, Barbara J. Orms, Roberta Oxford, Elvin B. Parchman, Mary Lou Parchman, Chan Park, Jung Park, Mary F. Phelps, Paul C. Staudt, Nelson D. Stewart, Lynn A. Stewart, William J. Sullivan, Margaret A. Sullivan, Millard F. Turner, M. David Wier, Nancy L. Wier, Allen Williams, Felicia Williams, Luther G. Wright, Juan B. Zurita, Marilyn A. Zurita, Thomas R. Hager, Wanda D. Hager, H. Davis Tubre, Jr., Janis L. Tubre, John A. Vece, Diana M. Vece, Michael D. Baird, Connie Baird, Wallace G. Banks, II, Evelyn J. Banks, Bruce G. Bartlett, S. Anne Bartlett, Frank A. Bell, Mary A. Bell, Jack G. Benton, Debra K. Benton, George Chapman, Sharon L. Chapman, Philip Cornacchia, Jere W. Daykin, V. Sue Daykin, Presley W. Donaldson, Bobbie R. Donaldson, J. Brent Edwards, Sherrilynn B. Edwards, Jack Etchison, Barbara N. Etchison, Raul Garcia, Jr., Maria Louisa Garcia, James W. Green, Cheryle Dage Green, Carl W. Heady, Judy D. Heady, Kenneth P. Hill, Dorothy E. Hill, Earlene H. Hillard, Jerry A. Hitt, Susan B. Hitt, Ronald L. Hula, Judith Hula, John P. Hyde, Julia A. Hyde, Wesley Elden Jackson, Oscar Long, Anna Long, Cynthia D. Lutz, Gerald S. McCorkle, Carol F. McCorkle, John

Medaille, Christine Medaille, Charlie E. Moreno, Karen A. Moreno, Robert Lynn Mullin, Linda Jean Mullin, Gary Patton, Donna Patton, Roy C. Reynolds, Judy C. Reynolds, Chris C. Sanguinetti, Sheryl Sanguinetti, Larry Seeding, Linda Seedig, Arthur D. Sinclair, Sherry J. Sinclair, Henri D. Tatro, Jr., Mary L. Tatro, Stephen Twenge, Jo Ann Twenge, Debra Warden, and Timothy Dale Warden.

Judgment entered January 17, 2001.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
JUSTICE

Order issued March 13, 2001

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-99-01028-CV

JOE R. WILKINSON, ET AL., Appellant

V.

DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD, THE CITY OF DALLAS, AND THE CITY OF FORT WORTH, Appellee

---

ORDER

The appellant's February 16, 2001 motion for rehearing is hereby **OVERRULED**.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
JUSTICE

NO. 94-9369-H

JOE R. WILKINSON, et al.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	
v.	§	160TH JUDICIAL
	§	DISTRICT
DALLAS/FORT WORTH INTERNATIONAL	§	
	§	
AIRPORT BOARD, etc., et al.,	§	DALLAS COUNTY, TEXAS
	§	
Defendants.	§	

ORDER GRANTING SUMMARY JUDGMENT

On the 17th day of February, 1999, came on to be heard the Defendants' Motion for Summary Judgment (Wilkinson Plaintiffs). The Court, having considered the Defendants' Motion for Summary Judgment, the pleadings on file at the time of the hearing, the Plaintiffs' response to the motion, the arguments of counsel, and the applicable authorities, and having stricken the Plaintiffs' Sixth Amended Original Petition as untimely filed, concludes that the Defendants' Motion for Summary Judgment should be, and hereby is, GRANTED, and all of the claims of the Plaintiffs, Joe R. Wilkinson, Mary Doreen Wilkinson, Wayne Musgrave, Jackie L. Musgrave, Wajidali S. Aliadina, Laila W. Aliadina, Kenneth F. Book, Debbie J. Book, Michael L. Bright, Gail L. Bright, Thomas V. Carroll, Parrie Jane Carroll, Gerard Catu, Rickey J. Chenault, Pam Chenault, Marzanne Claiborne, Rick D. Conley, Susan M. Conley, Esther Elizabeth Day, Ric Ellis, Mohammad Forghani, Stephan R. Fulce, Betty Jane Fulce, Dennis M. Goodrich, Walter L. Gregg, Rex W. Henegar, Abbie G. Henegar, William H. Hill, Carole A. Hill,

Kathleen Eichelberger Hodnett, Kenneth R. Jordan, Carolyn S. Jordan, James T. Kahl, Homa B. Kahl, Bong Sun Kim, Philip Song, Janet Kinney, John Edward Kleman, Raylin A. Denise, Dorothy T. Ledbetter, D. Y. Lemaire, Gail D. Koch Lemaire, D. H. Lewter, Margie R. Lewter, Robert A. Lloyd, Gary W. McClelland, Mary A. McClelland, Rickey G. McCraney, Valerie J. Tarricone McCraney, Daniel C. Meyer, Carole B. Meyer, Charisie Montgomery, Max M. Morgan, Kathryn Morgan, Jim Nation, Judy Nation, Walter M. Nolley, Debra Nolley, Virginia M. Parrish, Calbert Monte Perkins, Lynda J. Perkins, Tom L. Pressly, Jancheryl Nicholas Pressly, D. Charles Ratliff, Steven J. Reynolds, Margaret J. Reynolds, Timothy Reynolds, Jesse Byron Rogers, Jr., Roberta Fallon Rogers, Clyde Roy, Simon Schilder, Theresia A. Schilder, Mark J. Seavert, Laura Ann Seavert, Milton W. Sick, Jr., Karen R. Sick, James W. Snider, Jr., Donna K. Snider, Manford J. Steele, Barbara A. Steele, Dung Ngoc Sun, Bang Ngoc Trinh, Dung Thi Bui, Garry Waldrum, Kimberly Waldrum, William E. Warner, Deborah T. Warner, Sharon A. Weston, Jean A. Rose, James M. Wheeler, Linda J. Wheeler, Cary Wilburn, Linda Wilburn, Lawrence W. Winkler, Kathryn Ann Winkler, Reginald D. Wray, Linda S. Wray, Bo Chu Yu, Shing Yin Yu, Max I. Larsen, Alvis Arthur, Sheila Arthur, Deborah Bacon, Donald L. Eicholz, Marilyn T. Eicholz, Abdulrahim Panchbhaya, Mahrunnisha Panchbhaya, Richard G. Durbin, Linda Brand, and all others named as Plaintiffs herein, are dismissed with prejudice, and judgment hereby is rendered that the Plaintiffs take nothing from the Defendants by their claims, that all relief requested by the Plaintiffs is denied,

and that the Defendants recover their costs from the Plaintiffs.

Signed on this 25 day of March, 1999.

/s/ David C. Godsey
Judge Presiding

(Cause No. 94-9369-H)

WILLIAM D. BAKER, et al.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	162ND JUDICIAL DISTRICT
DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD, etc., et al.	§	DALLAS COUNTY, TEXAS
Defendants.	§	

ORDER GRANTING SUMMARY JUDGMENT

On the 17th day of February, 1999, came on to be heard the Defendants' Motion for Summary Judgment (Baker Plaintiffs). The Court, having considered the Defendants' Motion for Summary Judgment, the pleadings on file at the time of the hearing, the Plaintiffs' response to the motion, the arguments of counsel, and the applicable authorities, concludes that the Defendants' Motion for Summary Judgment should be, and hereby is, GRANTED, and all of the claims of the Plaintiffs, William D. Baker, Mary Baker, Bill Reid, Linda Reid, Frank J. Stangel, B. W. Bartlett, Paula Bartlett, Elmo M. Blount, Darlene S. Blount, John Flood, Martha Flood, Casey Foster, Kay Foster, Charlene Gilbert, Robert H. Haymes, Peggy M. Haymes, Donald L. Johnson, Virginia L. Johnson, Rex Lawson, Tammy Lawson, Patricks Moriarty, Susan Moriarty, Jim Simpson, Homer Tompkins, Betty Tompkins, Kingston Yong, Joy Yong, and all others named as Plaintiffs herein, are dismissed with prejudice,

and judgment hereby is rendered that the Plaintiffs take nothing from the Defendants by their claims, that all relief requested by the Plaintiffs is denied, and that the Defendants recover their costs from the Plaintiffs.

Signed on this 6 day of April, 1999.

/s/ David C. Godsey
Judge Presiding

(Cause NO. 94-9369-H)

JOHN A. VECE, et al.,	§	IN THE DISTRICT
Plaintiffs,	§	COURT
	§	
v.	§	160TH JUDICIAL
DALLAS/FORT WORTH	§	DISTRICT
INTERNATIONAL	§	
AIRPORT BOARD, etc.,	§	DALLAS COUNTY,
et al.,	§	TEXAS
	§	
Defendants.	§	
	§	

ORDER GRANTING SUMMARY JUDGMENT

On the 17th day of February, 1999, came on to be heard the Defendants' Motion for Summary Judgment (Vece Plaintiffs). The Court, having considered the Defendants' Motion for Summary Judgment, the pleadings on file at the time of the hearing, the Plaintiffs' response to the motion, the arguments of counsel, and the applicable authorities, and having stricken the Plaintiffs' Third Amended Original Petition as untimely filed, concludes that the Defendants' Motion for Summary Judgment should be, and hereby is, GRANTED, and all of the claims of the Plaintiffs, John A. Vece, Diana M. Vece, Michael D. Baird, Connie Baird, Wallace G. Banks, II, Evelyn J. Banks, Bruce G. Bartlett, S. Anne Bartlett, Frank A. Bell, Mary A. Bell, Jack G. Benton, Debra K. Benton, George Chapman, Sharon L. Chapman, Philip Cornacchia, Jere W. Daykin, V. Sue Daykin, Presley W. Donaldson, Bobbie R. Donaldson, J. Brent Edwards, Sherrilynn B. Edwards, Jack Etchison, Barbara N. Etchison, Raul

Garcia, Jr., Maria Louisa Garcia, James W. Green, Cheryle Dage Green, Carl W. Heady, Judy D. Heady, Kenneth P. Hill, Dorothy E. Hill, Earlene H. Hillard, Jerry Hitt, Susan Hitt, Ronald L. Hula, Judith Hula, John P. Hyde, Julia A. Hyde, Wesley Elden Jackson, Oscar Long, Anna Long, Cynthia D. Lutz, Gerald S. McCorkle, Carol F. McCorkle, John Medaille, Christine Medaille, Charlie E. Moreno, Karen A. Moreno, Robert Lynn Mullin, Linda Jean Mullin, Gary Patton, Donna Patton, Roy C. Reynolds, Judy C. Reynolds, Chris C. Sanguinetti, Sheryl Sanguinetti, Larry Seeding, Linda Seedig, Arthur D. Sinclair, Sherry Sinclair, Henri D. Tatro, Jr., Mary L. Tatro, Stephen Twenge, Jo Ann Twenge, Debra Warden, Timothy Dale Werner, and all others named as Plaintiffs herein, are dismissed with prejudice, and judgment hereby is rendered that the Plaintiffs take nothing from the Defendants by their claims, that all relief requested by the Plaintiffs is denied, and that the Defendants recover their costs from the Plaintiffs.

Signed on this 6 day of April, 1999.

/s/ David C. Godsey
Judge Presiding

(Cause NO. 94-9369-H)

PETE KENNY BARKIS, et al.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	95TH JUDICIAL DISTRICT
v.	§	
DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD, etc., et al.,	§	OF DALLAS COUNTY, TEXAS
Defendants.	§	

ORDER GRANTING SUMMARY JUDGMENT

On the 17th day of February, 1999, came on to be heard the Defendants' Motion for Summary Judgment (Barkis Plaintiffs). The Court, having considered the Defendants' Motion for Summary Judgment, the pleadings on file at the time of the hearing, the Plaintiffs' response to the motion, the arguments of cousnel, and the applicable authorities, and having stricken the Plaintiffs' Third Amended Original Petition as untimely filed, concludes that the Defendants' Motion for Summary Judgment should be, and hereby is, GRANTED, and all of the claims of the Plaintiffs, Pete Kenny Barkis, Debbie Barkis, Dorothy Allred, Robert Batemen, Jo Ann Bateman, Donald L. Brown, Elanora Bell Brown, F. Larre Bryant, Charles David Coffey, Donna E. Coffey, Arnold Conley, Mary A. Conley, Bruce Monroe Crone, Jack Dehart, Doris Dehart, Donald B. Doherty, Lewis R. Feinberg, Dana M. Franklin, Benjamin Joseph Griffin, Connie L. Griffin, William J. Harris, Sarah Lynn Harris, German Pittman Haymore, III, Linda Susan Haymore, Derrell D. High, Violet

Northcutt High, John Hill, Lynn Hill, Douglas Kinser, Mozelle Kinser, Wayne Kirk, John Mammen, Theresa Mammen, Russell H. Orms, Barbara J. Orms, Roberta Oxford, Elvin B. Parchman, Mary Lou Parchman, Chan Park, Jung Park, Mary Phelps, Paul C. Staudt, Nelson D. Stewart, Lynn A. Stewart, William J. Sullivan, Margaret A. Sullivan, Millard F. Turner, M. Davis Wier, Nancy L. Wier, Allen Williams, Felicia Williams, Luther G. Wright, Juan B. Zurita, Marilyn A. Zurita and Thomas R. Hager, Wanda D. Hager, H. David Tubre, Jr., Janis L. Tubre and all others named as Plaintiffs herein, are dismissed with prejudice, and judgment hereby is rendered that the Plaintiffs take nothing from the Defendants by their claims, that all relief requested by the Plaintiffs is denied, and that the Defendants recover their costs from the Plaintiffs.

Signed on this 6 day of April, 1999.

/s/ David C. Godsey
Judge Presiding

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

August 23, 2001

Mr. Walter W. Leonard
One Summit Ave., Suite 1010
Ft. Worth, TX 76102

Mr. Joseph G. Werner
Haynes and Boone
901 Main Street, Suite 3100
Dallas, TX 75202

RE: Case Number 01-0361
Court of Appeals Number: 05-99-01028-CV
Trial Court Number: 94-09369-H

Style: JOE R. WILKINSON, ET AL.
v.
DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

The court of appeals' opinion is ordered published pursuant to Tex. R. App. P. 47.3(d).

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin,
Blanca E. Morin, Deputy

cc: Ms. Lisa Matz, Clerk
Mr. Jim Hamlin